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Considerations on the principle of energy solidarity in the EU legal framework

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Abstract: This paper tries to analyze after the energy crisis of recent years how energy policy in the sector of the European Union has developed after the Treaty of Lisbon and what role the principle of solidarity has played in this sector. The role of jurisprudence is once again definitive, evolutionary, precise and clear to give new ideas for thought and criticism in the energy sector. Regulatory developments on the subject after the conflict of the Russian Federation in Ukraine paves the way for a broad discussion as well as a basis for the development of energy protection and security in the sector of the European Union for new generations.

Keywords: energy solidarity; energy policy; energy supply; energy security; Regulation (EU) 2022/1032.

Introduction

In recent years, the discourse, concern and business of energy has been a topic in continuous discussion, especially within the EU which has been oriented from the beginning towards a Green Deal towards clean energy (Krämer, 2020; Thieffry, 2020; Sikora, 2021)¹ given that energy consumption is based on non-renewable primary sources, i.e. oil and natural gas that come from other countries outside the European context². As is normal, the Member States of the EU are completely devoid of overall production at the Union level which is insufficient to satisfy internal demand, making imports a “necessary evil” (Szydło, 2018). Above all the dependence on the Russian Federation and especially after the war with Ukraine the imports via conduit especially through Gazprom³ which conveys Russian gas to Europe pass through Ukraine (Brotherhood and Soyuz), then pass through Slovakia, Hungary and Romania to divide into two supply branches towards the states of the northern and southern areas. In the same context, we also notice the transmission of gases via what are called Yamal-Europa which cross Belarus to Poland and Lithuania. The Trans-Balkan

¹Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 11 December 2019, The European Green Deal, COM (2019) 640 final.

²International Energy Agency (IEA), Report-Key World Energy Statistics, 2020.

³Gazprom was made in 1989 following the privatization that took place by the gas ministry of the Soviet Federation which is the main company for the extraction and sale of natural gas supplying the industries and consumers of the Russian federation but also the European states and Asians via pipelines.

pipeline system is a set of pipelines that supplies Russian natural gas to Greece, Romania and Bulgaria, after transiting through Ukraine and Moldova. Another European country such as Germany is directly helped by Russia via the Nord Stream 1 pipeline which crosses the Baltic Sea and part of the supply which is then delivered to the Czech Republic via the contiguous Eugal pipeline. Estonia, Finland and Latvia are served via independent pipelines (Vitaly, 2020). In addition to the existing gas pipelines, work began on Nord Stream 2 in 2018, a project that followed the same route as Nord Stream 1 as it directly connected the gas pipeline to the Czech Republic (Krämer, 2020).

More or less this framework of energy supply and purchase is strengthened by a European energy policy with the aim of diversifying the purchase and supply of gas coming from the Russian Federation.

During the year 2021 we notice the Trans Adriatic Pipeline (TAP)⁴ project, a southern passage that transports natural gas from Azerbaijan to the EU that crosses Greece, Albania and Italy (Nazarov, 2015; Schubert, Pollak, Kreutler, 2016)⁵. On the Mediterranean corridor, the construction of gas pipelines was then financed which connected North Africa with Italy, the so-

⁴<https://www.tap-ag.com/>

⁵Regulation (EU) no. 347/2013 of the European Parliament and of the Council, of 17 April 2013, on guidelines for trans-European energy infrastructures and which repeals decision no. 1364/2006/CE and amending the regulations (CE) n. 713/2009, (EC) no. 714/2009 and (CE) n. 715/2009, OJ L 115, 25.4.2013.

called Green Stream and TransMed and Spain via Medgaz and Maghreb. In European territory the gas is then allocated between the various Member States of the EU through trans-European networks for the transport of the related energy (TEN-E)⁶.

The dependence on energy sources determines security of supply, making the energy system of the EU and any limitations that arise from exogenous variables. Member States can rely on minor suppliers for natural gas to be transported via pipelines crossing the territory of other third states. The interruption of a supply service occurs not only due to a technical failure, but rather to a dispute between the supplier and the entity last supplied if the states hinder the passage of the service as can be seen in the last few months which are in conflict with the supplier state.

Natural gas supplies to EU Member States were completely cut off after the war started in Ukraine in March of 2022 (Stern, 2006; Mišik, 2019; Turksen, 2019; Fleming, 2019; Weiner, 2019; Tabagari, 2022; Flouros, 2022). The European Commission (EC) through Josè Barroso has published a free green: A European strategy for sustainable, competitive and secure energy⁷ trying to start the creation of a deeper collaboration between the different sectors of intervention in the

⁶<https://www.consilium.europa.eu/en/press/press-releases/2022/05/16/ten-e-council-gives-green-light-to-new-rules-for-cross-border-energy-infrastructure/>

⁷European Commission, Green Paper. A European strategy for sustainable, competitive and secure energy, COM/2006/0105 final (not published in the Official Journal).

energy field. The occurrence of crises in the energy sector is not a new element in practice and for the EU the topic of legal discussion is that of solidarity in the sector due to the deficiencies and vulnerability in the energy system that affects the community (Petit (2009-2010); Ahner, Glachant, 2012; Kndot, Tews, 2017).

Among other things, on the management of crisis situations in supply we focus on the ruling of the Court of Justice of the European Union (CJEU) in *Germany v. Poland* case (Bartenstein, 2021; Iakovenko, 2021; Ryš, 2022; Münchmeyer, 2022)⁸ which concluded the procedural event that began with the Court's ruling in 2019 in *Poland v. Commission*⁹. A ruling which constitutes an important first step since the reasoning carried out contributes to better defining the role of solidarity in the energy sector also reaching the new regulation relating to the sharing of storage plant capacities between Member States¹⁰. An effective, coherent and efficient energy integration towards a now de facto solidarity between the Member States, recalling for the romantic integrators of the EU the Schuman Declaration of 9 May 1950 (Bossuat, 2004)¹¹.

⁸CJEU, C-848/19 P, *Germany v. Poland* of 15 July 2021, ECLI:EU:C:2021:598, not yet published.

⁹GC, T-883/16, *Poland v. Commission* of 10 September 2019, ECLI:EU:T:2019:567, published in the electronic Reports of the cases.

¹⁰Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending regulations (EU) 2017/1938 and (EC) n. 715/2009 as regards gas storage, OJ L 173, 30.6.2022.

¹¹Schuman Declaration of 9 May 1950: "Europe cannot be made at once, nor will it be built all together; it will arise from concrete achievements which above all create

The energy policy of the European Union

Energy supply strategies have been differentiated since the 1970s where the energy sector was not yet become a policy. Only at a supranational level did it begin to talk about realizing the goals of the internal market (Talus, Aalto, 2020; Huhta, 2021). A first light can be seen with the Maastricht Treaty since it refers to Art. 3 (t) an initial interest in a field that was about to grow in the near future (Cross, Delvaux, Hancher, Slot, Van Calster, Vandenberghe, 2007; Andersen, Goldthau, Sitter, 2016; Pereira Rolim, 2019). Obviously, a first clarification was not noted but only an elaboration that the institutions have begun through strategies to reconnect to the objectives of other sectors of intervention, especially in the trans-European networks and the environment (Rodrigue, 2012).

We already remember art. 129B which established that the community should contribute to the establishment and development of trans-European networks in the sectors of transport, telecommunications and energy infrastructures. Already art. 130S established the adoption of measures, such as a certain sensitivity on the choice of a Member State between different energy sources and on the structure of its energy supply, going so far as to speak for renewable energy sources and biofuels (De Luca, Lubello, Lucifero, 2019; Blanke, Mangiamelli, 2021).

a de facto solidarity (...)”.

As expected and normal, only with the Treaty of Lisbon can we see a concrete, precise step with reference to the common energy policy in the primary law of the Union through the former Art. 4 TFEU (Pielow, Lewendel, 2012). Already Art. 194 TFEU defined the objectives of the Union's energy policy and clarifies the principles that must orient it towards a single energy market which is based on respect for environmental sustainability (Blanke, Mangiamelli, 2021)¹², to an environment that cultivates energy production and consumption as well as solidarity between Member States as an important principle for the near future (Andoura, Vinois, Delors, 2015)¹³. We can now speak for a type of competition of this competence clearly given that each Member State can:

“(...) determine the conditions of use of its energy sources, the choice between various energy sources and the general structure of its energy supply (...). It confirms the possibility for the Council to unanimously adopt measures having a significant impact on the choice of a Member State between different energy sources and on the general structure of its energy supply (...). The Union institutions may limit the national discretion with a view to greater strategic integration in order to guarantee the good functioning of the energy system as a whole (...)”¹⁴.

The connection with the objectives of the internal market and environmental protection has contributed to the energy policy as a common nature with a highly transversal character, intervening in a systematic and harmonized way allowing the adoption of legislative measures aimed at achieving greater

¹²See: Art. 194(1) TFEU.

¹³CJEU, C-490/10, *European Parliament v. Council* of 6 September 2012, ECLI:EU:C:2012:525, published in the electronic Reports of the cases.

¹⁴CJEU, C-490/10, *European Parliament v. Council* of 6 September 2012, *op. cit.*

integration on the European market energy, energy efficiency and investment in renewable sources that enhance the security of energy supplies (Talus, 2013; Kanellakis, Martinopoulos, Zachariadis, 2013; Vandendriessche, Saz-Carranza, Glachant, 2014; Dieter, 2014).

A first place of an energy integration and policy system that responds to the logic of a new globalized market is characterized by the presence of operators and holders of exclusive rights within each Member State. The need for a regulatory package in the electricity and gas sector has made it possible to provide a uniform and all-encompassing regulation of the different phases of energy policy, assuming a central realization towards a structural separation with an active mode of transmission and production activities, providing companies vertically integrated a reduction in obstacles to the entry of new operators into the market¹⁵. One of the main objectives is the proper functioning of the internal market to avoid interruptions in the supply of oil, electricity and natural gas¹⁶, as an intervention by the Union

¹⁵Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.08.2009; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211, 14.08.2009.

¹⁶Council Directive 2009/119/EC of 14 September 2009 establishing the obligation for Member States to maintain a minimum level of stocks of crude oil and/or petroleum products, OJ L 265, 9.10.2009. Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk preparedness in the electricity sector and repealing Directive 2005/89/EC, OJ L 158, 14.6.2019. Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 aimed at preventing and dealing with emergency situations at the level

which consolidated the relative dependence on imports of natural gas and oil from third states by strengthening the rules also applicable to the main exporters of energy products.

Within this new context, we recall the Directive 2019/692¹⁷ which in reality left the old foundations of the Directive 2009/73 (Javad, 2019)¹⁸ trying to introduce only new provisions aimed at overcoming the initial intention of promoting the liberalization of the sector energy within the internal market. The version of the directive allows the application of rules governing the internal gas market at EU level also to transport pipelines between a Member State and a third state. The access of third parties to the transport and distribution systems is thus guaranteed as well as the extension of the obligation to separate the companies that own the networks and carry out the management of the transport activities and the related companies to carry out supply/production activities and supply of natural gas.

of each individual Member State and/or of the Union, OJ L 280, 28.10.2017.

¹⁷Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, OJ L 117, 03.05.2019. On this point, it should be recalled that on 12 July the Court of Justice annulled the order of the Court declaring inadmissible the action for annulment brought by Nord Stream 2 AG against Directive 2019/692. See also: CJEU, C-348/20 P, Nord Stream 2 v. European Parliament and Council of 12 July 2022, ECLI: EU:C:2022:548, not yet published.

¹⁸Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Text with EEA relevance), OJ L 211, 14.8.2009, p. 94-136.

The issue of security of energy supply of the EU has acquired a central role and expressed in the European Energy Security Strategy of 2014¹⁹. The Treaty of Lisbon completed the internal energy market especially the multiplication of interconnections that came through the vulnerability of Member States. We are talking about an essential and persistent vulnerability that depends on imports, limited diversification, as well as high and volatile energy prices that import the related security risks in the countries of production and transit. With the communication of 16 October 2014 relating to the short-term resilience of the European gas system²⁰, the Commission had pre-established:

“(...) the potential effects of a partial or total interruption of gas supplies from Russia as the main energy partner, concluding that national policies alone would not be sufficiently effective in the event of a major disruption (...). It adopted a collective approach based on further strengthening cooperation in network development and developing preparatory and planning measures to improve resilience to sudden interruptions in energy supply to the benefit, in particular, of the most vulnerable Member States (...)”²¹.

As early as 2015, the Commission proposed the creation of an Energy Union:

“(...) which would go beyond the consolidation of the internal market, promoting a strategy aimed at integrating five priorities: decarbonisation, energy efficiency, integration of energy market, research and innovation, energy security and solidarity (...)” (Roeben, 2018; Fleming, 2019; Schlacke, Knodt, 2019)²².

¹⁹Communication from the Commission to the European Parliament and the Council, European Energy Security Strategy, COM(2014) 330 final, 28.05.2014.

²⁰Communication from the Commission to the European Parliament and the Council on the short-term resilience of the European gas system Preparing for a possible supply disruption from the East in autumn and winter 2014/2015, COM/2014/0654 final /2, 10.16.2014.

²¹COM(2014) 330 final, cit., p. 5.

²²European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the

Within this context, solidarity is now a priority principle that reconstructs an active energy movement of a heterogeneous character by assuming an overall legal framework of the Union.

Energy solidarity and legal aspects in the framework of the EU

The principle of solidarity should be seen as a key to the integration and evolution of the European Union law in the energy sector, representing a point of reference for the structural configuration of a now supranational legal system. The EU responds to a dynamic and functional integration that responds to national interests in a space that seeks to guarantee national advantages. An idea of solidarity that takes on different connotations as a corrective element of the tension between heterogeneity of interests and regulator of the exercise of public authority in favor of a common interest, i.e. a responsible interest where through solidarity it rebalances the starting conditions and difficulties which arise from the application of EU law as rebalancing solidarity (Czuczai, 2017). A solidarity that invokes the necessary intervention in mutual assistance in situations of contingent difficulty and a crisis as a type of emergency solidarity (Clement, 2014).

Regions and the European Investment Bank, A framework strategy for a resilient Energy Union, accompanied by a forward-looking energy policy climate change, COM(2015) 80 final, 25.2.2015. The regulatory framework for the Energy Union is based on Regulation 2018/1999 of 11 December 2018 on the governance of the Energy Union and climate action, OJ L 328, 21.12.2018.

Let us remember that solidarity is part of Art. 2 TEU, as well as also includes the preamble of the Charter of the Fundamental Rights of the European Union (CFREU): among the “indivisible and universal values on which the Union is founded” (Böhm, 2015; Itzcovich, 2017; Blanke, Mangiamelli, 2021; Kassoti, Idriz, 2023). The treaty of Lisbon included solidarity as the objective of every type of relationship that establishes the legal order of the EU in an inter-individual and inter-state manner (McDonnell, 2014). Solidarity is an objective that recalls the desire of Member States to “intensify solidarity between their peoples while respecting their history, culture and traditions” (Berramdane, 2011). Furthermore, solidarity as an objective operates in the external dimension of the Union: in art. 3(5) TEU specifies that

“in its relations with the rest of the world, the Union (...) contributes to peace, security, sustainable development of the Earth, solidarity and mutual respect between peoples (...)” (Levade, 2012; Domurath, 2013; Blanke, Mangiamelli, 2021).

Solidarity as a principle is brought back to substantive law as shown by the Treaty of Lisbon which enhances a series of provisions that are part of different competitive sectors.

Solidarity is a general principle that has to do with various other sectors, we remember the economic, social and territorial (articles 174 and 177 TFEU) (Holder, Layard, 2010; Butler, 2018), migration policy (articles 67, 78 and 80 TFEU) (Marin, Penasa, Romeo, 2020), economic governance (art. 122 TFEU)

(Louis, 2012) and obviously the energy sector (art. 194 TFEU) (Petit, 2009-2010; Ahner, Glachant, 2012), especially when catastrophes and terrorist attacks occur (art. 222 TFEU) (Gestri, 2012; Blockmans, 2014; Hilpold, 2015; Athanasiadou, 2019)²³ as well as to the common foreign and security policy (art. 24 TEU) (Ferreira-Pereira, Groom, 2010; Novàky, 2017), as well as “islands of solidarity” (Hilpold, 2015). Solidarity as a principle also appears to have an uncertain nature (Küçük, 2016), given that the “constitutional” or structural character of said principle as a benefit of the European integration process (Ross, 2010; Levade, 2012)²⁴ arises as topic of evaluation and discussion before those who deny the general principle of law (Tridimas, 2006; Simon, 2008; Lenaerts, Gutiérrez-Fons, 2011; Van Cleynenbreugel, 2018). This principle is called upon to operate in various emergency scenarios and above all through the identification of help to Member States which provide for the sharing of responsibilities as an integration and support of those deriving from the principle of loyal cooperation referred to in Art. 4(3) TEU (Klamert, 2014; Goldner Lang, 2020)²⁵.

²³CJEU, C-589/15P, *Anagnostakis v. Commission* of 12 September 2017, ECLI:EU:C:2017:663, not yet published.

²⁴See the Conclusions of the Advocate General Mengozzi presented in case: C-226/16, *Eni SpA* of 26 July 2017, ECLI:EU:C:2017:616, published in the electronic Reports of the cases, par. 33.

²⁵CJEU, joined cases of C-63/90 and C-67/90, *Portuguese Republic and Kingdom of Spain v. Council of the European Communities* of 13 October, 1992, ECLI:EU:C:1992:381, I-05073, par. 51.

This representation of the “complementary integrationist forces” (Klamert, 2014; Ziegler, Neuvonen, Moreno-Lax, 2022) is projected with the related distinctions towards the pursuit of a common and supranational interest (Klamert, 2014; Borger, 2020)²⁶. The distinction between solidarity and loyal cooperation is based on the fact that the second makes use of the general principle of law, finding implementation in every sectoral area of integration, suitable for establishing obligations on Member States and EU institutions²⁷. Solidarity can also have a limiting nature, especially in emergency interventions, given that loyal cooperation is also applied in these types of interventions. In this case we can clarify the obligations of loyal cooperation as an aim towards the realization of European integration where solidarity takes on the simple role of objective as a value of the

²⁶According to Klamert: “(...) both are aspirational in the sense that they speak to ambitions yet to be fulfilled (a closer union through the development of law with loyalty on the one hand and stronger mutual support with solidarity on the other (...))”. See also in argument: CJEU, joined cases: 6 and 11/69, Commission of the European Community v. French Republic of 10 December 1969, ECLI:EU:C:1969:68, 00523. C-77/77, Benzine en Petroleum Handelsmaatschappij BV and others v. Commission of the European Communities of 29 June 1978, ECLI:EU:C:1978:141, 01513. joined cases 154, 205, 206, 226-228, 263 and 264/78, 39, 31, 83 and 85/79, SpA ferriera Valsabbia and others v. Commission of 18 March 1980, ECLI:EU:C:1980:81, 00907, par. 59.

²⁷CJEU, joined cases, C-622/16 P to C624/16 P, Scuola Elementare Maria Montessori Srl of 6 November 2018, ECLI:EU:C:2018:873, published in the electronic Reports of the cases, par. 84. In the same spirit of orientation see also the next case: C-331/20 P, Volotea v. Commission of 17 November 2022, ECLI:EU:C:2022:886, not yet published. C-128/17, Republic of Poland v. European Parliament and Council of European Union of 13 March ECLI:EU:C:2019:194, published in the electronic Reports of the cases, par. 75. C-644/17, Eurobolt BV of 3 July 2019, ECLI:EU:C:2019:555, published in the electronic Reports of the cases, par. 31. C-575/18 P, Czech Republic v. Commission of 9 July 2020, ECLI:EU:C:2020:530, not yet published, par. 73.

legal system (Bieber, Majani, 2012)²⁸.

Remaining on the regulatory discussion, we remember the Regulation 2017/1938²⁹ relating to the security of gas supply which is based on Art. 194(2) TFEU (Blanke, Mangiamelli, 2021). As an act that regulates various aspects of supply in the framework of the EU referring to solidarity measures that have to do with severe reductions (Steinvorth, 2017) that derive from climatic and adverse conditions related to crises that have to do

28 The principle of solidarity: “(...) a) takes on a multipurpose and variable scope depending on the context in which it is invoked, now objective or parameter for the Union's action, now basic value, now criterion of the obligations that the Member States have signed by joining the Union and b) constitutes the common denominator that links the different emanations of solidarity within the framework of the Union consisting in the recognition of the existence of a common interest separate and separable from the sum of individual interests. The reconciliation, however, between what those two authors claimed to establish between the findings they made under a) and under b) was not clearly understandable already at the time in which they were expressed. Now, it is even more unsuitable to provide a key to understanding the position of the Advocate General Eleanor Sharpston since in her opinion the principle of solidarity understood as a general principle of Union law is not limited to being the common denominator that binds the different emanations of sectoral solidarity promptly expressed by specific provisions of Union law, but adds to these to constitute the autonomous source of further rights and obligations with respect to his thesis, recalling that the Court of Justice, in referring to the content of the principles directly established by these rules (...) intends to strengthen solidarity, focused mainly on its interconnection with the principle of loyal collaboration, noting a violation of it on all occasions in which a Member State had deliberately refused to apply certain provisions of European law violating the right to fulfill the obligations voluntarily assumed by becoming part of the Union and thus jeopardizing the achievement of the common objectives identified by the Treaties (...) that the principle of loyal cooperation is intrinsically connected with the principle of solidarity and can operate with an instrumental role in all fields of European Union law within the framework of its specific discipline. And if this is the case, it is not only intended to reinforce the application of duties specifically provided for by Union law, but also of duties that arise from the principle of solidarity operating as a general principle of that law (...)”.

29 Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures aimed at guaranteeing the security of gas supply and which repeals regulation (EU) no. 994/2010, OJ L 280, 28.10.2017.

with interruptions of supplies³⁰. The state of emergency according to Art. 11 of the aforementioned Regulation:

“(...) may request solidarity interventions from another Member State directly connected via a transnational network (...) and in strict compliance with certain conditions. In fact, it is required that the Member State in difficulty has not been able to cover the shortage in gas supply despite the application of the reduced tariffs already applied in the first phase of the emergency; has exhausted all market measures and all measures provided for in its emergency plan (...)”³¹; has notified the Commission and the competent authorities of all Member States of an explicit request accompanied by a description of the measures implemented; and, finally, undertakes to promptly pay fair compensation to the Member State providing solidarity (Sangiovanni, 2013). In addition, it must be said that the regulation regulates the case in which an emergency situation is symmetrical in nature, therefore affecting the entire Union or regional area. In these circumstances, pursuant to Art. 12, the Commission may declare a state of emergency at the request of the competent national authority, making use of the opinions and consultation of the Gas Coordination Group (GCG), established pursuant to Art. 4 of the same regulation (...)”³².

It is thus understood that after the Commission decides on the underlying reason that does not justify the declaration of the state of emergency and does not declare the purpose and informs the Council of the relevant decision and the reasons it was based on.

³⁰Regulation 2017/1938, art. 13. To facilitate the interpretation of this provision, the Commission adopted Recommendation 2018/177 of 2 February 2018 on the elements to be included in the technical, legal and financial arrangements agreed between Member States for the application of the solidarity mechanism pursuant to of Article 13 of Regulation (EU) 2017/1938 of the European Parliament and of the Council concerning measures to safeguard security of gas supply, OJ L 32/52, 6.2.2018.

³¹See Art. 8 of Regulation 2017/1938.

³²The GCG is composed of representatives of the Member States by representatives of the respective competent authorities, the Agency for the Cooperation of Energy Regulators, the European Network of Transmission System Operators for Gas (ENTSOG) and the representative bodies of the sector concerned and those of relevant customers.

Regulation 2017/1938 sought to ensure the continuity of gas supply throughout the Union, as well as to introduce specific solidarity measures of an emergency and structural nature by integrating with extraordinary interventions and provided for by the former Art. 122(1) TFEU which states:

“the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, measures appropriate to the economic situation, in particular where serious difficulties arise in the supply of certain products, in particular in the energy sector” (Blanke, Mangiamelli, 2021).

We note some indications on the value attributed to the principle of energy solidarity which is relevant to the fact that the regulation makes explicit the existence of a solidarity obligation when a Member State makes a request through the activation of pre-established instruments and bilateral agreements (Coman, Fromont, Weyembergh, 2019), as stated by the Commission itself which stated:

“(…) the methods of application of the solidarity mechanism, where we read that the request for solidarity is valid and triggers the obligation to provide solidarity from the moment the request is made (...)”³³.

The regulation tries to underline:

“(…) the invocation of solidarity measures must take place in *extrema ratio*, having first used all the means available (...)” (Delhomme, Hervey, 2023)³⁴.

The regulation and with connection to the principle of solidarity does not represent a principle of charity, but rather an implication of participation in favor of the state that acted in solidarity. Solidarity is conceived in a general context of

³³Recommendation 2018/177, op. cit., section 1.3.

³⁴Regulation 2016/369 of 16 March 2016 based on Art. 122 TFEU. Council Decision 2014/415 of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, OJ L 192, 01.07.2014, art. 4).

morality, as an obligation attributed to a group where the individual members are linked to each other through a relationship of reciprocity and institutionalized solidarity (Lenaerts, Adam, 2021).

We must underline that solidarity manifests itself through an interstate manner and with supranational interest. Already Art. 13 of the Regulation 2017/1938 did not regulate the role of the Union institutions but regulates the intervention of the Member States. Art. 12 refers to large-scale emergency situations and recalls:

“the solidarity expected between Member States (...) to achieve a common interest (...)” (Neergaard, 2010). Also in the 2015 Communication the Commission stated that: “(...) it is necessary to strengthen solidarity between Member States, especially in times of supply crises (...)”³⁵.

The role of the CJEU in energy solidarity

According to Art. 32 of Directive 2009/73 relating to the internal market of natural gas³⁶, the European Commission has already approved “the decision of the German Federal Network Agency to exempt the OPAL gas pipeline from the application of the rules on third party access to gas pipeline networks and on tariff discipline”. Gazprom never fulfilled the conditions imposed by the Commission which are related to its position in the competitive market and that it could only exploit 50% of its capacity starting as early as 2011. In 2016 the German Federal

³⁵COM(2015) 80 final, section 2.1.

³⁶Directive 2009/73/CE, op. cit.

Agency notified the Commission:

“(...) the intention to modify the derogation regime for access to the OPAL gas pipeline in such a way as to guarantee its exploitation to its full capacity, provided that at least 50% of this capacity was sold through auctions (...)”.

The Commission approved the German Authority's modification proposal³⁷. In December 2016, Poland challenged the European Commission's decision before the Court, requesting its annulment (Szydło, 2018; Buschele, Talus, 2019; Boute, 2020)³⁸.

In this regard, Poland argued:

“(...) the existence of violation of Art. 36 of Directive 2009/73 read in conjunction with Article 194(1), letter. b), TFEU (...) the application of the decision would have led to an increase in the volume of Russian gas against a decrease in the use of alternative transit routes, such as for example the Yamal gas pipeline which passes from Russia through Belarus and Poland (...) could therefore jeopardize Polish energy security, in particular, as well as hindering that of the entire Union, by slowing down or blocking efforts to diversify gas imports (...) Poland objected to the failure to comply with the principle of energy solidarity provided for in Art. 194 TFEU (...) Commission-supported by Germany-considered that energy solidarity is a political concept that appears in its communications and documents, while the contested decision had to satisfy the legal criteria set out in Article 36, par. 1, of Directive 2009/73 (...)”³⁹ the principle of solidarity between Member States, referred to in Article 194, paragraph 1, TFEU, on the one hand, is directed at the legislator and not at the administration that applies the rules and, on the other hand, concerns only crisis situations in the supply or functioning of the internal gas market, while Directive 2009/73 establishes the principles relating to the normal functioning of this market (...)”⁴⁰.

³⁷Commission Decision C(2016) 6950 final on review of the exemption of the OPAL pipeline from the requirements on third party access and tariff regulation of 28 October 2016.

³⁸Szydło, 2018; Buschele, Talus, 2019; Boute, 2020. The principle of solidarity and the geopolitics of energy: Poland v. Commission (OPAL pipeline). *Common Market Law Review*, 3, 889-914.

³⁹GC, T-883/16, Poland v. Commission of 10 September 2019, op. cit., par. 65.

⁴⁰GC, T-883/16, Poland v. Commission of 10 September 2019, op. cit., par. 66.

Within this context, the spirit of solidarity in the energy sector had to be interpreted as a guiding value applied exclusively in emergency situations but not in ordinary circumstances. Already the sentence under investigation, the CJEU established that:

“(...) the spirit of solidarity mentioned in Article 194, paragraph 1, TFEU is the specific expression, in this sector, of the general principle of solidarity between Member States, mentioned, in particular, in Article 2 TEU, Article 3(3) TEU and Article 24(2) and (3) TEU, as well as in Article 122(1) TFEU and Article 222 TFEU. This principle is the basis of the entire Union system, in accordance with the commitment established in Article 4, paragraph 3, TEU (...) (Blanke, Mangiamelli, 2021)⁴¹ the energy solidarity referred to in Art. 194 TFEU is a principle which includes rights and obligations for both the Union and the Member States and which also entails a general obligation on the part of the Union and the Member States, in the exercise of their respective competences, to take into account the interests of other operators (...)”⁴².

Thus the CJEU establishes that the EU in relation to an energy policy:

“(...) implies that the Union and the Member States must seek, in the exercise of their competences under that policy, to avoid adopting measures affecting the interests of the Union and of other Member States, as regards security of supply, its economic and political sustainability and the diversification of sources of supply or supply, with a view to taking on their interdependence and their de facto solidarity (...)”⁴³.

The principle of solidarity was evaluated as a hermeneutic criterion and applied in the acts adopted by the institutions, given that the Directive 2009/73 as a parameter of legitimacy carry out a balance between the interests of the Union and those of the other and Member States⁴⁴. For the judges of the Luxembourg the Commission had to examine the consequences

41GC, T-883/16, Poland v. Commission of 10 September 2019, op. cit., par. 69.

42GC, T-883/16, Poland v. Commission of 10 September 2019, op. cit., par. 74.

43GC, T-883/16, Poland v. Commission of 10 September 2019, op. cit., par. 75.

44GC, T-883/16, Poland v. Commission of 10 September 2019, op. cit., parr. 77, 78, 81.

of the change in the regime of exploitation of the OPAL gas pipeline in relation to the security of supply in Poland as well as in the context of the Union. The principle of solidarity is considered as an integrative, specific and concrete act in the energy sector which gives rise to rights and obligations that respect the relevant regulations. The Court concluded that the Commission's decision had been adopted thus violating the principle of energy solidarity which is based on Art. 194 TFEU and as a consequence should be annulled.

(Follows): Germany v. Poland

After the relative support of the Commission, Germany appealed the sentence based on the erroneous legal assessment of the principle of energy solidarity and the relative non-applicability to the specific case. The arguments used in the table brought into question a particular legal framework given that Germany used energy solidarity as:

“(...) an abstract, purely political notion, and not a legal criterion in the light of which it would be possible to evaluate the validity of an act adopted by an institution of the Union (...). The purpose of primary law is not to establish legal criteria that can be relied on in court, but rather to politically define the general framework in which the Union develops, as well as the objectives of the latter, which are pursued and implemented through regulations and directives (...)”⁴⁵ the principle of energy solidarity should be applied only to guarantee the security of supplies in times of crisis and not for “other abstract aspects (...) the principle of energy solidarity justifies the activation of an

⁴⁵CJEU, C-848/19 P, Germany v. Poland of 15 July 2021, op. cit., parr. 27, 28, 56.

emergency mechanism which must be used in exceptional cases, implying only in these cases “an unconditional obligation of assistance (...)”⁴⁶. Has this principle been considered exceptional? The Union has been hindered or prevented given the different points of view and objectives which could rarely be reconciled? The EU is not such a naive institution. We rigorously use this expression given the arguments used especially when Germany itself through Art. 13 of the Regulation 2017/1938 showed that the duty of assistance that derives from the principle of energy solidarity must be applied in the event of an absolute emergency⁴⁷.

Are there first and second class emergencies?

The European Commission reiterated that the principle of energy solidarity is not an autonomous legal criterion that can be invoked only when evaluating the legitimacy of an act adopted in implementation of EU law. This is not a unique alignment, given that Poland, Latvia and Latvia have relatively argued that the principle of solidarity:

“(...) represents the specific expression of the general principle of solidarity between Member States but also that the Commission is bound by it to respect since it must look after the general interest of the Union both in times of crisis and in ordinary circumstances with an eye to the adoption of preventive measures. Therefore, a restrictive interpretation of the principle of energy solidarity would not be acceptable, as it would not comply with the text of Art. 194 TFEU nor to the rights and obligations arising from this provision (...)”⁴⁸.

46CJEU, CJEU, C-848/19 P, Germany v. Poland of 15 July 2021, op. cit., par. 57.

47CJEU, C-848/19 P, Germany v. Poland of 15 July 2021, op. cit., parr. 8, 36, 31, 65.

48CJEU, C-848/19 P, Germany v. Poland of 15 July 2021, op. cit., parr. 66.

The CJEU relied on the treaties of the EU and related previous rulings as in the *Commission v. Italy*⁴⁹ and *Commission v. United Kingdom*⁵⁰ cases, where the judges of the CJEU qualified:

“(...) the principle of solidarity as a fundamental principle of the supranational order⁵¹. The principle of solidarity is mentioned in various provisions of the Treaties. It belongs to that type of principles underlying the law primary of the European Union (...)”⁵².

Solidarity takes on a principle that marks the bases and limits of the action of the Union which is strengthened by the importance that primary law also has in terms of value and objective of the integration process:

“(...) the principle of solidarity entails rights and obligations both for the Union and the Member States, bearing in mind that the Union has an obligation of solidarity towards the Member States and that the latter have an obligation of solidarity among themselves and towards the common interest of the Union and the policies conducted by the latter (...)”⁵³.

A fundamental principle of solidarity that produces binding legal effects for Member States and institutions of the EU was the basic line of the CJEU. In *speciem* the Advocate General Campos Sánchez-Bordona in pars. 76 and 77 of his Conclusions stated that (Münchmeyer, 9 April 2021)⁵⁴:

“(...) this principle underlies the totality of the objectives of the Union's

49CJEU, C-39/72, *Commission v. Italy* of 7 February 1973, ECLI:EU:C:1973:13, I-00101, par. 25.

50CJEU, C-128/78, *Commission v. United Kingdom* of 7 February 1979, ECLI:EU:C:1979:32, 00419, par. 12.

51CJEU, C-848/19 P, *Germany v. Poland* of 15 July 2021, op. cit., par. 38.

52CJEU, C-848/19 P, *Germany v. Poland* of 15 July 2021, op. cit., par. 39.

53CJEU, C-848/19 P, *Germany v. Poland* of 15 July 2021, op. cit., par. 49.

54Conclusions of the Advocate General Campos Sánchez-Bordona, presented in case C-848/19 P, *Germany v. Poland* of 18 March 2021, op. cit., ECLI:EU:C:2021:218, not yet published.

energy policy, grouping them together and giving them coherence. Therefore, it does not only bind the EU legislator but also the Commission since “this principle, like the general principles of Union law, constitutes a criterion for evaluating the legitimacy of the measures adopted by the Union institutions (...)”⁵⁵.

For the CJEU the principle of solidarity cannot be limited to the need to guarantee security of supplies. This is a precise manifestation of the principle of energy solidarity that the ultimate goal is always not to stop its supply as a general obligation of solidarity and in the exercise of its respective competences under the Union's energy policy. This application of the principle of energy solidarity does not imply, if we can say so, unconditional loyalty but a timely and limited intervention where the implementation of this policy remains in the main interests of the Union as in the various Member States which strengthen with continuous interest a process of balancing of interests in the event of a dispute. We can say that even the position of the EC, given that it did not take relevant information on the matter from Poland, did not take into account the risks for the security of supplies on the Polish market and as a consequence it was not accepted. The CJEU stated that:

“(...) in any case the institution should have carried out the verification, as a requirement deriving from the principle of energy solidarity read, moreover, together with that of loyal cooperation (...)”⁵⁶.

Thus the CJEU rejected the grounds of the appeal brought by Germany and the related violation of the principle of energy

⁵⁵CJEU, *Germany v. Poland* of 15 July 2021, op. cit., parr. 45, 47, 71, 73.

⁵⁶CJEU, *Germany v. Poland* of 15 July 2021, op. cit., parr. 50-53, 69, 43.

solidarity.

Towards a new context of energy solidarity

The jurisprudential trend followed up to now allows us to say that the legal nature of energy solidarity within the scope of application *ratione temporis* has had a preceptive scope. This is a limiting tendency towards the invocation of solidarity interventions as a response to emergency situations as foreseen by Art. 122 (1) TFEU (Blanke, Mangiamelli, 2021). The spirit of solidarity has materialized in a sharing of burdens and the adoption of temporary assistance mechanisms in favor of the Member State that has been hit by disasters or other types of crises, avoiding normalization and extension to ordinary situations. The CJEU recognized that the application of this principle goes beyond the strictly emergency dimension which intervenes where preventive measures are contemplated and aimed at implementing the general objectives according to Art. 194 TFEU (Blanke, Mangiamelli, 2021). Solidarity does not find application exclusively in the response phase but rather in that of a preventive nature which has the objective of preventing and verifying not only the related crisis created but also the pre-existing imbalances between the Member States in relation to energy supply as a rebalancing nature. Prevention is a criterion that we have seen within the EU in various policy sectors which

in our investigation has the aim of reiterating the principle of energy solidarity as an objective of energy policy and giving relative coherence by stating that the limit of application of the principle of energy solidarity is based during the crisis on Art. 222 TFEU, situations with different objectives (Blanke, Mangiamelli, 2021)⁵⁷.

Equally important is:

“(...) the aforementioned principle cannot be equated or limited to the need to ensure security of supplies, which is only one of the manifestations of the principle of energy solidarity, considering that Article 194, paragraph 1, TFEU sets out (...) four different objectives pursued, in a spirit of solidarity between Member States, by the Union's policy in the energy sector (...) the correct functioning of the energy market to which the dispute is based on an act, i.e. the Directive 2009/73 which regulates the internal gas market and which, unlike for example Regulation 2017/1938, does not specifically concern the security of energy supply (...). The nature and effects of the principle of energy solidarity therefore does not correspond to a topic potentially applicable from an emergency perspective, but rather to an ordinary management discipline (...)”⁵⁸.

It is understood that the scope of the principle of solidarity is aligned according to that established by the treaties and by establishing the overall management model of energy policy.

According to jurisprudence, energy solidarity is capable of producing binding legal effects both for the Member States and for the institutions of the Union. The related acts adopted and their legitimacy must be assessed according to the principle of energy solidarity. Solidarity was understood as a guiding and

57CJEU, Germany v. Poland of 15 July 2021, op. cit., parr. 68, 47, 44.

58CJEU, Germany v. Poland of 15 July 2021, op. cit., par. 45.

inspiring principle for the adoption of concrete assistance measures and tools without substantial implications. Of course, an abstract and generic content is observed and according to an interpretation of a wide margin of discretion in the definition of less or no solidarity measure, the institutions enjoy a wide margin of maneuver in deciding the modality of the solidarity measures considering as recipients the positive obligations that are pre-established in emergency situations. It was not specified by the judges of the CJEU that rights and obligations were sufficiently precise for the purposes of solidarity which appeared weak to the subjects and conditions, discretionary measures and more. In the case of emergency solidarity, its impact seems to be verifiable only *ex post*, i.e. at the moment of the concrete activation of the regulatory instruments that are inspired by solidarity reasons. The legal value of the principle of solidarity is reconstructed through jurisprudence in a way that fills a normative content capable of exercising the function of an autonomous parameter for checking the legitimacy of legislative and non-legislative acts. Based on the words of the Advocate General Campos Sánchez-Bordona in the previous paragraphs we can understand that the principle of solidarity should have a binding character as an *ex ante* evaluation criterion in the adoption of specific decisions. The spirit of solidarity between Member States, the Institutions of the Union cannot be

exempted from the duty to adopt measures that reflect this spirit. This results in the obligation to provide material or financial assistance in times of emergency but also to balance the individual national interests and those of those potentially affected by the related measures adopted regardless of the existence of a crisis scenario.

It seems difficult not to notice the lack of precise indications that have to do with the typical content of solidarity obligations as well as the practical implications of one's operations. Referring to a general obligation to balance the interests of the parties in non-emergency management scenarios and which can be easily traced back to the considerations of a manifestation of the principle of loyal cooperation. The obligations of loyal cooperation are disguised as obligations of solidarity because they are justified by a vision of solidarity and result in de facto solidarity. The position of the judges to underline the preceptive, autonomous character of the principle of energy solidarity outside of emergency situations remains incomprehensible. It is undeniable that the content of the solidarity obligations derives from the remaining justiciability which is obscure. The CJEU has contributed to strengthening the principle of energy solidarity by creating a container with the perspective that solidarity obligations are functional in respecting the principle of loyal cooperation, finalizing with a teleological key the

pursuit of a common interest of integration. Filling the container created as a jurisprudential basis appears to be the principle of energy solidarity and loyal cooperation as complementary principles that find application at a systemic level, informing energy emergency scenarios for ordinary management through a variable geometry as required by Art. 194 TFEU (Blanke, Mangiamelli). The construction of an energy solidarity system is efficient in this area of intervention. The commission itself has already recognized this approach in its communication of 2015, stating that:

“(...) the spirit of solidarity in energy issues (...) constitutes the fulcrum of the Energy Union (...)”⁵⁹.

For the moment we can welcome these jurisprudential statements in a positive way, given that they attribute a precise value to the principle of energy solidarity by building a legal framework based on insistent obligations on both the Member States and the institutions of the EU.

Energy supply and solidarity

With the emergence of the Russian Federation conflict in Ukraine, Germany sought to freeze the upgrade of the Nord Stream 1 pipeline and the operation of the Nord Stream 2 completed in September of 2021 (Pau, 2022). From a political and practical point of view, we see the need for a common

⁵⁹COM(2015) 80 final, op. cit., section 2.1.

strategy for energy supply. From a legal point of view we can talk about an autonomy of the Union from Russian supplies. Operation which was completed effectively.

In addition to representing a retaliation against Russia, this decision has, at the same time, encouraged the Union institutions and the Member States towards an acceleration of the common strategy for energy supply. Already since March 2022, the representatives of the Member States have invited the Union to hold coordination contacts with neighbors and international partners such as energy suppliers to guarantee imports of oil and LNG⁶⁰.

In speciem, the EC adopted on 8 March 2022 an initiative entitled: “RePowerEU plan”⁶¹ with the objective of independence of the Union from Russian fossil fuels even before 2030⁶². In the Resolution of 7 April 2022 the European Parliament:

“(…) called for the presentation of a plan aimed at continuing to ensure the security of energy supply in the EU in the short term (…)”⁶³.

⁶⁰Informal meeting of heads of state or government, Declaration of Versailles, 10 and 11 March 2022, <https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf>

⁶¹https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3131

⁶²Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, REPowerEU: Joint European Action for safer, more sustainable and affordable energy, COM(2022) 108 final, 8.03.2022. <https://www.eea.europa.eu/policy-documents/communication-from-the-commission-to-1>

⁶³European Parliament resolution of 7 April 2022 on the conclusions of the European Council meeting of 24-25 March 2022, including the latest developments of the war in Ukraine and the EU sanctions against Russia as well as their implementation (2022/2560(RSP)), point

The European Council of 23 June 2022 called for:

“(...) to urgently improve preparedness for possible major supply disruptions to ensure affordable energy supplies (...)”⁶⁴.

At the end of June the European Parliament and the Council adopted the Regulation (EU) 2022/1032 which amended Regulation (EU) 2017/1938 giving new insights on the capacity of storage facilities between Member States⁶⁵. This act confirms what is established in Art. 6a of the initial EC⁶⁶ proposal, according to which:

“(...) underground gas storage facilities in the territory of the Member States will have to be filled to at least 80% capacity before winter 2022/2023, and 90% before the following winter periods (...). Member States which do not have storage facilities on their territory are expected to have access to gas storage reserves in other Member States through the conclusion of bilateral agreements in order to share the financial burden of filling obligations. Member States without underground storage facilities will use a storage capacity corresponding to 15% of their annual gas consumption over the last five (...) the establishment of an alternative sharing mechanism of the charges, the conditions of which will be clarified later. Finally, it is interesting to note that the preamble of the regulation introduces the hope that Member States will set, albeit on a voluntary basis, higher filling objectives so that the Union can collectively aim towards 85% filling of gas stocks (...)”⁶⁷.

Articles 12 and 13 of the regulation just cited focus on solidarity

18. <https://www.europarl.europa.eu/delegations/en/product/product-details/20220502DPU32808>

⁶⁴Conclusions of the European Council of 31 May, parr. 24-26.

⁶⁵Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending regulations (EU) 2017/1938 and (EC) n. 715/2009 as regards gas storage, OJ L 173, 30.6.2022.

⁶⁶Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2017/1938 of the European Parliament and of the Council concerning measures to guarantee the security of gas supply and Regulation (EC) No. 715/2009 of the European Parliament and of the Council on the conditions for access to the natural gas transmission networks, COM(2022) 135 final, 23.03.2022.

⁶⁷Regulation (EU) 2022/1032, art. 6 quarter. This provision effectively codifies what some Member States have already done, autonomously concluding bilateral agreements on gas supply.

mechanisms and question the sharing between Member States of welcoming and giving substance to solidarity bonds by integrating their own manifestation of mutual trust that must exist between them to achieve integration objectives. The obligation to share and storage capacity of gas according to ex Art. 6 bis, understood as sharing the burden of prevention and preparation for a crisis scenario, represents the manifestation of the principle of energy solidarity. This belief, as the EC itself notes in its own report, states that:

“(...) only EU action motivated by a spirit of solidarity between Member States can guarantee effective preparation against an interruption in supply, which would cause damage lasting for citizens and the economy (...)”⁶⁸.

An idea of solidarity placed in a broad framework of the management of a crisis is confirmed and is not limited to the response alone but also contemplates an intervention in the phases preceding the possible occurrence of a situation that becomes unpredictable⁶⁹. The emergency clauses and additions to the regulation are placed in the context of energy supply at a supranational level, trying to move towards a common and structured vision. The changes made concern the provision relating to gas supply standards and not to Art. 13 as a regulation for the adoption of solidarity measures in the event that supply is reduced or interrupted.

⁶⁸COM(2022) 135 final, op. cit., sect. 2.

⁶⁹Regulation (UE) 2022/1032, op. cit., preamble, recital 5.

Within this context, the Council then adopted Regulation 2022/1369⁷⁰ based on Art. 122(1) TFEU and not on Art. 194 TFEU (Blanke, Mangiamelli, 2021). This is a regulation with a pure solidarity vision of the emergency, aimed at the adoption of temporary, proportionate and extraordinary measures⁷¹ guaranteeing in a concrete way the immediate possibility of avoiding strong economic and social repercussions in the event of total supply interruptions. According to the EC through the Communication Saving gas for a safe winter⁷², the objective of this regulation is:

“(...) to constitute an intervention tool that supports and integrates the ordinary energy supply system illustrated above (...) provides new rules for the immediate and coordinated reduction of gas demand, while still leaving states free to choose the methods and measures of intervention (...)”⁷³, and introduces the possibility of declaring a state of alarm at Union level⁷⁴, useful for ensuring that all Member States adopt the necessary measures to deal with a possible energy emergency (...)”⁷⁵.

By carefully reading the regulation we also distinguish an obligation of coordination which provides for the idea of solidarity given that Member States that are not interconnected with the gas networks of other Member States must be exempt from mandatory gas reductions, capable of releasing large

⁷⁰Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated measures to reduce gas demand, OJ L 206, 08.08.2022.

⁷¹Council Regulation (EU) 2022/1369 of 5 August 2022, op. cit., par. 9.

⁷²Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Saving gas for a safe winter, COM(2022) 360 final, 20.07.2022.

⁷³Art. 6 of Regulation 2022/1369.

⁷⁴Art. 4 of Regulation 2022/1369.

⁷⁵Art. 5 of Regulation 2022/1369.

volumes from pipeline to benefit others⁷⁶. These solidarity mechanisms remain faithful to the protection of the Member States and the distorting effects deriving from the interruption of supplies in such a way as to avoid suffering, or rather accepting the responsibilities, more serious consequences than others when faced with an emergency of a symmetrical nature. The principle of energy solidarity reinforces that of loyal cooperation which seems to permeate this new regulation which deals with extremely emergency situations. Who can calculate the emergency volume? Perhaps these are gaps on purpose to allow the legal will to move as it should according to the crisis situation it has to face.

The Council at May 2022 meeting projects towards the creation of a European emergency plan that coordinates the spirit of solidarity aimed at preventing serious interruptions in the supply of individual states by establishing coordination and burden-sharing obligations, representing a more rigorous legal manifestation to all levels⁷⁷. It is underlined that the overall regulation on energy supply is not free from potentially critical aspects. The mechanism of Regulation 2022/1032 promotes the creation of a distribution structure that is capable of anticipating crises in the energy supply of the Member States. The states are left with a wide margin of maneuver in defining the measures

⁷⁶Art. 5 of Regulation 2022/1369.

⁷⁷Conclusions of the European Council during the extraordinary meeting of 30 and 31 May 2022, EUCO 21/22, par. 29.

aimed at implementing the objectives of filling.

The new EU Energy Platform aims to conclude bilateral agreements for gas storage, representing a voluntary coordination mechanism. The good functioning of the overall system is that Member States are willing to share new imports through the European Union's internal gas pipeline network system and joint procurement in order to address expected gas shortages. Of course, some have concluded bilateral agreements confirming the action in a spirit of solidarity that affects their prerogatives in material areas of a competing nature⁷⁸. The construction of an energy system reflects the principle of solidarity in the various facets which is desirable, taking into account the division of competences between Member States and the Union. This consideration is appropriate in reference to the fact that in the energy sector the Member States enjoy discretion in relation to their autonomous treaty making power with third states. Agreements that cannot yet occur the positive or negative of that road. The negotiation process with third states and the individual room for maneuver of the Member States must be considered the conclusion of bilateral solidarity agreements within the framework of the Union providing for the sharing of the energy capacity of the quantity of gas imported on

⁷⁸The first bilateral solidarity agreement had already been signed between Germany and Denmark on 14 December 2020, while 5 other agreements were subsequently signed by Germany and Austria on 2 December 2021; Estonia and Latvia on January 4, 2022; Lithuania and Latvia on March 10, 2022; Italy and Slovenia on 22 April 2022; Finland and Estonia on April 25, 2022.

the basis of the agreements concluded. The limited willingness/power of some Member States to negotiate with third states determines in an unbalanced way the conclusion of solidarity agreements between Member States, as a situation of imbalance in the energy sector, intensifying the already existing asymmetries. National competence on the external level does not take into account elements that risk impacting the internal law of the EU in the energy sector. Opinion 1/13 of the CJEU took a position regarding the potential contradictions of common Union rules, their meaning, scope and effectiveness (Govaere, 2015)⁷⁹. The obligation to balance national interests for the creation of a single energy market was understood in the CJEU as an obligation of solidarity with the Member States. The negotiation for the purchase of gas on behalf of the participating Member States by the EC represents an adequate and necessary tool not only for the strengthening of the European gas management structure but also as a guarantee of compliance with the principle of solidarity involving the Union institutions in accordance with the principle of attribution of competences. The innovations of Regulation 2022/1032 seem to be attributable to the ruling of the CJEU in *Germany v. Poland* case by promoting stringent solidarity in the field of energy supply as a whole beyond the emergency response phase. The construction

⁷⁹CJEU, Opinion 1/13 of 14 October 2014, ECLI:EU:C:2014:2303, published in the electronic Reports of the cases, parr. 73-74.

of a supply management system based on burden sharing welcomes the moment that reflects the structural vision of solidarity that can be invoked in the last resort. The innovations brought are justified by the crisis situation in gas supplies during the conflict between Ukraine and the Russian Federation within a purely emergency scenario. Energy security represents one of the different declinations of energy policy which is structurally and inevitably intertwined with emergency profiles. The limitation regarding the regulatory framework remains connected to the fact that the traditional perception of solidarity as a responsible principle in emergencies is a factor that can be evaluated for future regulatory developments which reflect the orientation of the CJEU in affirming the principle of solidarity as a reality in entire energy policy that prefigures a real European energy policy.

Conclusions

From the previous paragraphs we understood that the need to introduce the principle of solidarity into the energy policy of the Union is also the basis for greater integration which finds space in primary law accompanied by a solidarity approach. The spirit of solidarity based on Art. 194 TFEU is consolidated by the awareness that energy supply is not only a question of security which involves only geopolitical dynamics but also of solidarity

especially in favor of citizens of the Union who experience emergency situations. The CJEU in *Germany v. Poland* cases affirms that energy solidarity is suitable and assessable for an extended meaning that respects the Union's legal system as an interpretative canon for the measures adopted in the energy sector, regarding its legitimacy.

The CJEU has given the energy solidarity contained in Art. 194 TFEU a broad application of this principle, of the value and objective of political and legal integration in a functional way responding to fears of a current or future interruption of energy supplies by building an effective supply system operating on a constant basis providing for solidarity obligations strengthened to the principle of loyal cooperation as a systemic and structural principle of the legal system. The principle of energy solidarity continues to evaluate and demonstrate through the jurisprudence of the CJEU that further measures are needed within the scope of solidarity of a structural nature and capable of regulating the energy system even outside the scenario of the crisis of recent months. The non-limitation of the application of the principle of solidarity only to emergency situations allows the consolidation of a real energy union. The choices of the Member States, as well as the positions of the Union institutions, will be under investigation in the near future, above all on the legal value of the mechanisms for enforcing the principle of energy solidarity

and the obligations deriving within the framework of the integration process. It is necessary to monitor the gravitational attraction exerted by the principle of loyal cooperation deriving from the membership of the Union (Klamert, 2014), strengthening the principle of solidarity that operates in the constitution of a common energy policy that is reconciled with the discretion of the Member States in the definition of their own energy issues. The need to make the energy sector more independent at the level of the EU while also simultaneously asking for greater independence of the Member States as well as a growing development of a European area of cooperation is one of the major future integration challenges, as respect for the founding treaties and as a policy of integration of energy solidarity.

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